(2)

Supreme Court, U.S.
FILED
APR 28 2003
CLERK

No. 02–1437

In the Supreme Court of the United States

OCTOBER TERM, 2002

AARON RAISER, PETITIONER

v.

HONORABLE TOM DASCHLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED STATES SENATE AND UNITED STATES SENATORS BILL FRIST AND TOM DASCHLE IN OPPOSITION TO THE PETITION FOR CERTIORARI

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel,
Office of Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224–4435
Counsel for Respondents.

APRIL 2003.

7PP

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner lacked Article III standing to bring this suit challenging the United States Senate's procedures in fulfilling its constitutional responsibility to provide advice and consent on judicial nominations.

2. Whether the court of appeals properly held that the incurable jurisdictional defects supported dismissal of the amended complaint with prejudice.

In the Supreme Court of the United States

OCTOBER TERM, 2002

NO. 02–1437

AARON RAISER, PETITIONER

v.

HONORABLE TOM DASCHLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED STATES SENATE AND UNITED STATES SENATORS BILL FRIST AND TOM DASCHLE IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondents United States Senate and United States Senators Bill Frist[1] and Tom Daschle submit this brief in opposition to the petition for a writ of certiorari filed by *pro se* petitioner Aaron Raiser.

STATEMENT OF THE CASE

This *pro se* petition arises out of an amended complaint filed by Aaron Raiser in the United States District Court for the District of Utah. Petitioner alleged that for a number of years the Senate has violated its constitutional duty to provide advice and consent by referring judicial nominations to the Senate Judiciary Committee. Amd. Compl. ¶¶5–10. Petitioner claimed that the Senate Judiciary Committee's consideration of such nominees has delayed the filling of judicial vacancies in the federal courts,

[1] Senate Majority Leader Bill Frist is automatically substituted for his predecessor in office, Senator Trent Lott, as a defendant in this action. Fed. R. App. P. 43(c)(2).

which has allegedly prolonged the adjudication of other civil litigation that petitioner filed in the Utah District Court. *Id.* ¶¶ 11,12.

The district court dismissed the amended complaint with prejudice for lack of standing. No. 2:01–CV–894 (D. Utah) (Benson, C.J.), Appendix to Petition (hereinafter "Pet. App.") at 5a–6a. The court held that petitioner's allegations "represent just the type of generalized grievances . . . [that] do not constitute an injury in fact." *Id.* at 6a. The court further held that the "chain of causation" between petitioner's alleged injury and the conduct complained of "is too remote to satisfy the second prong of standing." *Id.* [2]

On appeal, the United States Court of Appeals for the Tenth Circuit summarily affirmed. No. 02–4142 (per curiam) (Seymour, Henry, Briscoe, JJ.), Pet. App. at 3a. The court held that "[t]he pendency of other litigation initiated by Raiser is insufficient to give him standing to challenge the Senate's referral of judicial nominations to the Judiciary Committee." *Id.* The court further held that the dismissal with prejudice was proper because the amended complaint's jurisdictional defects were incurable and because *res judicata*, in any event, would bar relitigation of the jurisdictional dismissal. *Id.*

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because it fails to raise any "compelling" federal question, Sup. Ct. R. 10, warranting this Court's attention. The decision below is in harmony with decisions of this Court and of other circuits and reflects a proper understanding and application of established principles delimiting the jurisdiction of federal courts under Article III of the Constitution.

---

[2] Other bases for dismissal presented to, but not addressed by, the district court because of petitioner's lack of standing were lack of personal jurisdiction, improper venue, lack of proper service, legislative and sovereign immunity, and nonjusticiability.

I. Article III confines the jurisdiction of the federal courts to the resolution of actual "Cases" and "Controversies." U.S. CONST. art. III, § 2. To meet this threshold jurisdictional requirement, a plaintiff must demonstrate injury in fact, a causal connection between the injury alleged and the conduct complained of, and a likelihood that the injury is redressable. *Bennett v. Spear,* 520 U.S. 154, 167 (1997). Petitioner satisfied none of these three irreducible constitutional minimum requirements of Article III standing.

First, the courts below correctly held that petitioner lacks "injury in fact." Pet. App. at 3a, 5a–6a. Petitioner's allegations about the Senate's (i) "not upholding the Constitution and performing their duty"; (ii) "hinder[ing]" the judicial system "from performing its con[s]titutional[l]y mandated responsibility"; and (iii) "society as a whole being to some degree harmed by an overburdened judicial system," Amd. Compl., ¶¶3(b), 11, are plainly "generalized grievance[s] about the conduct of government," *Flast v. Cohen*, 392 U.S. 83, 106 (1968), that cannot confer Article III jurisdiction.

Nor did petitioner suffer "injury in fact" from alleged delays in the adjudication of other civil litigation. The court of appeals correctly found that petitioner's "claims of alleged delay because of vacancies in the courts do not establish" cognizable injury. Pet. App. at 3a. Indeed, the wholly speculative effect of filling a judicial vacancy on the time line for adjudicating cases in the federal courts is precisely the type of "conjectural or hypothetical" harm that cannot confer Article III injury.

Second, petitioner did not establish that his alleged injury was "fairly traceable" to the challenged actions of the respondents. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The district court correctly held that "the chain of causation between the Senate's practices in considering nominations and the delays in processing nominations for judicial positions existing in the District of Utah is too remote to satisfy the second prong of standing." Pet. App. at 6a. Petitioner cannot demonstrate that

the Senate's referral of nominations to the Judiciary Committee *caused* any injury he alleged, as what action the Senate will take on a particular nomination and what action it would have taken under petitioner's preferred confirmation rules are entirely speculative.[3]

Third, petitioner's unprecedented request that the "Senate change its rules such that presidential judicial nominations not be denied full Senate consideration," Amd. Compl., Claim for Relief ¶ 1, would not predictively redress his claimed injury from alleged delays in the adjudication of cases pending in the federal courts. Even granting petitioner's requested relief, therefore, would not remedy his alleged injury.[4]

II. The court of appeals correctly declined petitioner's request to vacate the district court's dismissal of the amended complaint with prejudice to allow him to refile this suit in another judicial district. Pet. App. at 3a. Where, as here, jurisdictional defects cannot be cured, it is within the discretion of a district court to dismiss with prejudice. *Id*; *see also Bond v. Golden*, 273 F.2d 265 (10th

---

[3] Contrary to petitioner's contentions, Pet. at 11–12, he has not come close to the showing in *United States v. SCRAP*, 412 U.S. 669, 683–90 (1973), where the plaintiff environmental group alleged specific illegal action causing its members direct and imminent harms from depletion of natural resources and increased littering, or *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 73–74 (1978), where individuals suffering "immediate adverse effects" from living and working in dangerous proximity to nuclear power plants had standing to challenge a statutory limitation on the plants' accident liability.

[4] *Marbury v. Madison*, 5 U.S. 137 (1803), in no way supports petitioner's claim, Pet. at 12–13, that his alleged injury is redressable by a writ of mandamus to the Senate for contravening its duty to provide advice and consent as to judicial nominations. At issue in *Marbury* was the ministerial duty of the Secretary of State to deliver judicial commissions to individuals who had been nominated, confirmed, and appointed as District of Columbia judges. This case, by contrast, seeks to impose judicial supervision over the legislative process by which the Senate discharges its constitutional advice and consent duties.

Cir. 1959).[5] Even if the dismissal were without prejudice, *res judicata* would bar petitioner from relitigating this case in another court. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel.

APRIL 2003.

○

[5] In addition to the lack of standing, adjudication of petitioner's claim was also barred by the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1; *see Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); sovereign immunity, *see Keener v. Congress of the United States*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam); and the political question doctrine, *see Nixon v. United States*, 506 U.S. 224 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962).